1965

State of Utah, By and Through Its Road Commission v. Bettilyon's, Inc., and Nolan Oswald : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, by and through its Road Commission,
Plaintiff and Respondent,

v.

BETTILYON'S INC., and NOLAN OSWALD,
Defendants and Appellants,

Case No. 10277

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable Marcellus K. Snow, District Judge

PHIL L. HANSEN,
Attorney General,
RONALD N. BOYCE,
Chief Assistant
Attorney General,
ROBERT S. CAMPBELL, JR.,
Special Assistant
Attorney General,
State Capitol Building,
Salt Lake City, Utah,
Attorneys for Respondent.

KIRTON & BETTILYON,
336 South 3rd East,
Salt Lake City, Utah,
Attorneys for Appellants.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Statement of Appellants, as set out in their Brief, is adequate. We would but add that the action in condemnation was commenced and service of process made on the 22nd day of July, 1963.

DISPOSITION OF CASE BY LOWER COURT

The case, with respect to the fair value of the land condemned as well as damages to remaining property not taken, was tried before a jury of eight in June, 1964. A

verdict was returned and judgment entered for the Appellants and against the Respondent for $130,000.00 (R. 18, 19 & 20). The judgment has been paid and a receipt given (R. 61, 62). Certain factors of special damage raised by Appellants (a part of which underlie this Appeal) were, at the time of the trial by jury, reserved for subsequent determination. Upon later hearing in August, 1964, the Trial Court, after all interests had rested their cases, denied the claims of special damage of Appellants and granted the State's Motion for Involuntary Dismissal (R. 63, 64). Findings of Fact and Conclusions of Law thereon were also entered pursuant to Rule 52(a), Utah Rules of Civil Procedure (R. 72-78).

The Motion of Appellants for a new trial on damages was denied by the lower Court (R. 77) and a final Order of Condemnation was thereupon entered vesting in the Respondent, State of Utah, the fee interest in the demised premises (R. 65-67).

RELIEF SOUGHT ON APPEAL

Appellant's attempt to appeal from the Order denying a new trial (see Notice of Appeal, R. 79) is in vain, since that Order, as a matter of law, is not final from which an appeal may be sustained. *Little* v. *Gorman*, 19 Utah 63, 114 Pac. 321 (1911); *White* v. *Pease*, 15 Utah 161, 49 Pac. 255 (1897).

STATEMENT OF FACTS

The Statement of Appellants, while argumentative and largely without record designation, is substantially accur-

ate. The Court will note and distinguish the facts from the conclusions and arguments therein set forth.

To crystallize as well as add to the Appellants' Statement, Respondent submits the following set of facts as representative:

(a) Appellants, or their predecessors, purchased 35 acres of land (of which the condemned parcels constitute 12 acres) of undeveloped land in 1959 (R. 159).

(b) Appellants petitioned the Salt Lake County Planning Commission in 1960 to approve a subdivision plat of the property (R. 164, Ex. D-29-2). A hearing for final approval of the plan was scheduled before the Planning Commission in December of 1960 (Ex. D-29-5).

(c) The State Road Commission in the late 1950's and early 1960's, had under consideration the development of Interstate Highway 415, generically referred to as the Belt Route Freeway (Ex. D-29-1 & 4, R. 223-235). In 1960, the said facility was in initial planning status and although the "corridor location" had not been firmly established, it was anticipated that a portion of Appellants' property would be required for the Freeway (R. 235, 236).

(d) Because of the anticipated need, Road Commission personnel in December, 1960, requested that the County Planning Commission attempt to delay

development on such land "as provided by law", (Ex. D-29-5, R. 275) and "to use whatever legal means" available to the County to guard the area within the proposed Freeway right-of-way (Ex. D-29-9).

(e) Pursuant to County Ordinance 9-7-3, as revised, the Planning Commission on January 10, 1961, withheld final approval of Appellants' subdivision plat for a period of one calendar year, to enable the Respondent to buy the needed land (Ex. D-29-9, R. 275).

(f) The Appellants next petitioned the Planning Commission for final approval of the subdivision plat in May, 1963 (Ex. D-29-14, R. 275).

(g) Meanwhile, the Road Commission in 1961 and 1962, proceeded with further location studies and programming of the highway facility, including engineering and right-of-way design, and other technical and administrative measures of the Project (R. 234-241; Ex. D-29-11, R. 275).

(h) There is accord among Appellants and Respondent that the planning, programming and design of the public improvement and the purchasing of right-of-way therefor, was accomplished by the Road Commission in a reasonable manner and without unnecessary delay (R. 181, 182, 238-240).

(i) The Road Commission and Bettilyon's negotiated for the purchase of the properties ultimately con-

demned in the forepart of 1963, but without reaching an accommodation (Ex. D-29-18, R. 275).

(j) The Respondent commenced this action to condemn a fraction of the Appellants' property in July of 1963.

The clearest statement of fact which weighs upon this Court is that entered by the trial Court in its Findings of Fact on the matter (R. 72, 73, 73A, 74, and 74A).

ARGUMENT

POINT I.

APPELLANTS HAVE FAILED TO DESIGNATE THE NATURE OF THE ERROR ALLEGEDLY COMMITTED BY THE TRIAL COURT IN THE MATTER.

It is apparent from Appellant's Brief that they have misconceived the essence of the appeal and the function of this Court therein. A reading of the same would suggest that the matter is presently under consideration by a court of original jurisdiction for trial *de novo* as to both fact and law. The Brief is void of citation of the claimed error committed by the lower Court and of the ensuing prejudice. For that matter, the Brief lacks averment that the trial Judge erred at all. Overlooked is the fundamental principal that a designation of error occasioned by the trial Court is necessary to this review. The fact is that the issues which Appellants raise were submitted by full-fledged trial to the lower Court. Findings of Fact and Conclusions of Law

were, upon special hearing, entered. Yet no reference t either is made in Appellants' Brief.

The appellate jurisdiction of this Court requires tha it not sit as the original arbiter of the fact and law. Arti cle 8, Section 9, *Utah Constitution.* In that the instant sui is one at law, the review is focused only upon the error of law committed by the trial Court. 78-2-2 U. C. A., 1953 *Whittaker* v. *Ferguson,* 16 Utah 240, 51 Pac. 980 (1898) *Van Leeuwen* v. *Huffaker,* 78 Utah 521, 5 P. 2d 714 (1931) Such error ought to be set out by Appellants in their Brief less it be abandoned. *Berg* v. *Otis Elevator, et al.,* 64 Utah 518, 231 Pac. 832 (1924).

POINT II.

RESPONDING TO APPELLANTS' POINT I, THE FACTS OF THE CASE DO NOT MANIFEST A TAKING, ACTUAL OR CONSTRUCTIVE, OF APPELLANTS' LAND IN 1961.

For lack of better specification, we assume that th nub of Appellants' first Point (that the Road Commissio caused a legal "taking" of their property in 1961) is Con clusion of Law No. 7 entered by the trial Court. It is ther provided:

> "7. That the acts of the Road Commission o the State of Utah in requesting the Planning Com mission of Salt Lake County to defer action on th proposed Random Woods Subdivision plat did no constitute a taking of the Defendants' propert without compensation and was not in violation o the 5th and 14th Amdt. to the Fed. Constitution o Art. 1, Sec. 7 and 22 of the Utah Constitution."

The claim is made that the Respondent, by its request to the Planning Commission in December of 1960 to withhold approval of the proposed subdivision plat, worked a non-physical expropriation of the subject property as of the date when the Planning Commission reserved approval. Upon that basis, they ask for relief that the Judgment on the verdict of the jury, entered June 29, 1964, carry interest at six per cent (6%) per annum from January 10, 1961, to the date of its entry. (See Apps.' Brief, Conclusion p. 33).

To begin with, if under these facts the Appellants' land were taken in the constitutional sense, it is quite clear that the proximate cause was not the request of the State Road Commission at all; rather, it was the action taken by the County Planning Commission pursuant to County Ordinance, 9-7-3. That Ordinance contains the proviso:

> "(1) When a preliminary plat is submitted for the division of property *a part or all of which is deemed suitable by the Planning Commission* for schools, parks, playgrounds, or other areas for public use, *the Planning Commission* shall apprise the proper agency in writing of the property owner's intent to subdivide. *If any such areas proposed for public use have not been freely dedicated to the public by the owner or have not been purchased at a fair price by the proper agency within one* (1) *year from the date of notification, such areas may be divided into lots and sold in accordance with the provisions of this Title.*" (Emphasis ours.)

The province of the Respondent under the Ordinance is recommendatory only. The power to act, in the first

and last analysis, rested with the Planning Commission. That Agency, and not the Road Commission, resolved to delay subdivision approval for one year. Albeit, the question of proximate cause need not be decided here for the acts of which complaint is lodged, whether by the Respondent or the County Planning Commission, did not affect a "taking" of the Appellants' property in 1961. The outer limits of time in which subdivision approval could be withheld under the Ordinance was one year from the date it was invoked. Under the facts extant in the case, therefore, delay could not have been protracted beyond January 10, 1962. If Appellants had petitioned at the latter time for approval of their plat, the Planning Commission would have been without aid to withhold ratification. But Appellants did not return to that Agency as was their right. Not until May of 1963, some sixteen months subsequent, did they again petition the Planning Commission for approval of the subdivision plan.

But there are several other things Appellants did not do during 1961, 1962 and the first five months of 1963, which are also obstacles in their path. They could have appealed the Planning Commission decision of January 1961, to the County Commission and ultimately to the District Court. 57-5-3 U. C. A., 1953 as amended; 78-3-4 U. C. A., 1953. They did neither. A mandamus action could have been filed against the Planning Commission to approve or reject the subdivision plan. Rule 65B(a), Utah Rules of Civil Procedure. Such was not done. Appellants could have, in a direct action against Salt Lake County,

attacked the validity and constitutionality of the Ordinance 9-7-3, on the ground that the one year restraint constituted a "taking" of land without compensation in contravention of State and Federal Constitutions. That remedy would have given to Appellants a decision as to which they now urge entitlement.

Rather than pursue any of the foregoing, Appellants choose presently to rest their cause on an attack upon the Ordinance in this proceeding.* Such an attack is collateral to the issues and the parties before the Court and is not permitted where opportunity otherwise existed to raise the question directly. The Massachusetts Supreme Court in the eminent domain suit of *Robinson* v. *Commonwealth,* 335 Mass. 630, 141 N. E. 2d 727 (1957) states the rule:

> "* * * The Petitioner contended that these zoning ordinances were invalid and offered to show through one Warner * * * that as applied to the parcels in question the Ordinances were invalid * * *. The only issue in this case is the ruling excluding such evidence of value.
>
> "There was no error.
>
> "The Petitioner had ample opportunity to attack directly the Ordinances if he had desired to do so. He could have filed a petition in the Land Court. * * *, or he could have filed a suit for declaratory relief in the Superior Court * * *, to determine the validity of the Ordinances, * * * (citing authorities); but in our opinion he could not

*The bulk of Appellants' Brief (pp. 22-27) is devoted to decisions wherein statutes and ordinances were found unconstitutional for one or more reasons.

> at the trial of the petition for land damages against the Commonwealth attack the zoning ordinances (citing authorities)."

Also, see *Bowling Green-Warren County Airport Bd.* v. *Long,* 364 S. W. 2d 167 (Ky.), *Nichols on Eminent Domain,* Vol. 4, P. 238, §12.322 to the same effect.

(a) *Under the facts of the case, a "taking" of Appellants' property did not occur.*

Apart from the County Ordinance, Appellants seem to argue that the request made by the Respondent of the Planning Commission to delay plat approval was, *ipso facto,* a "taking" of their property. That is hard to do in the face of a series of cases stemming from this Court, all demanding of a contrary result. *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953); *State Road Commission* v. *Danielson,* 122 Utah 220, 247 P. 2d 900 (1952); *Salt Lake & U. R. Co.* v. *Schramm,* 56 Utah 53, 189 Pac. 90 (1920); *Oregon Shortline R. Co.* v. *Jones,* 29 Utah 147, 80 Pac. 732 (1905). While the Court has more often than not defined what was not rather than what was a "taking", the precedent nevertheless established is a death blow to Appellants' appeal. The most recent decision rejecting Appellants' argument is *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953), a suit involving the condemnation of unimproved land. Therein, it was contended that by the filing of the complaint in condemnation, development of the property was foreclosed, that the tract was effectively seized by the condemnor, and that accordingly, a constructive "taking" of the land had occurred requiring the pay-

ment of interest on the judgment awarded from the date of service of summons. The State did not assume possession of the premises, pendente lite. It was the holding of the Court that interest, prior to the date of judgment, was not due, since there was no "taking" until actual possession by the condemnor. It was said:

> "* * * Appellants contend, (1) that the court improperly refused to allow interest on their judgment from the date of service of summons in the action, * * *.
>
> "* * * Appellants are not entitled to interest on the judgment prior to the time when actual possession was taken. This court has uniformly so held. * * *"

The Court noted the argument of the landowners (advanced in this case) that failure to allow interest on the judgment from the time of service of summons, constituted a "taking" counter to constitutional guarantees:

> "* * * Appellants further argue that failure to allow such interest constitutes a taking of private property for a public use without just compensation in violation of Article I, Sections 7 and 22 of the Utah Constitution and the Fourteenth and Fifth Amendments of the Federal Constitution. * * *"

The argument was rejected and the principle affirmed that interest in condemnation is payable only from the date of possession of the premises:

> "Appellants have cited no case and we have found none which holds that where under the state law the taking occurs when the possession of the

> property is actually surrendered, and not when the suit was commenced, that the failure to allow interest from the time of the commencement of the action constitutes a violation of these constitutional provisions, but a number of courts, including the Supreme Court of the United States, have held to the contrary. So we will adhere to our previous rule that interest is recoverable only from the time of taking possession of the property. * * *"

While the *Peek* decision is the more contemporary of the cases holding to the rule, the primogenitor is *Oregon Shortline R. Co.* v. *Jones*, 29 Utah 147, 80 Pac. 732 (1905). Substantively, the claim made there is that voiced by the Appellants here:

> "* * * Under Section 3599, appellants urge that the right to compensation accrues and is due on the date of the service of summons, and because thereof, and because no improvements put upon the property subsequent to that date shall be included in the assessment of compensation of damages, there is, when the summons is served, such an interference with the full enjoyment and ordinary benefits of the property by the owner, and such an invasion of his rights thereto, as to amount in legal effect, to a taking, within the meaning of the Constitution, providing that 'private property shall not be taken or damages for public use without just compensation.' And it is claimed, as the property was taken on that date, and as compensation therefor then became due, appellants were entitled to interest thereon from the date of the service of summons to verdict, less rents and other benefits of possession received by them covering the same period. * * *"

As in the case at hand, the issue in *Jones* was not whether there was a "taking"; it was rather, at what point did the "taking" occur. After discourse on the decisions of other jurisdictions, this Court stated that under the laws of Utah, a "taking" is not present unless there be entry or occupation by the condemning body:

> "* * * Considering again our statute, it is quite clear it excludes any claim to interest, at least such as is here made. It says in plain terms that the 'actual value at that date (service of summons) shall be the measure of compensation for all property to be actually taken,' etc.; that is, the Legislature has said the actual value of the land—no more, no less—shall be the compensation to be assessed. * * *
>
> "When the statute says the actual value of the land to be actually taken shall be the measure of compensation, and that plaintiff shall have final order of condemnation upon the payment of the sum of money assessed, it has excluded all other conditions. San Fran &. S. J. V. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473. To allow appellants' claim of interest to prevail, we are obliged to read something into the statute not found there. Nor does it come within any of the rules of the cases where interest has been allowed. *Here there has been no entry or occupation of the property.* Nor was there any time prior to the verdict of the jury when the amount of plaintiff's liability had been determined. Nor was there any time when it could have taken possession and given a writ of assistance therefor until final judgment and order of condemnation. And the authorities seem to be that one or more of these things must be shown to entitle the landowner to interest. * * *"

If it be the law of the case that a "taking" is not present by the filing of a complaint or service of process, it is magic to say that the request made by the Respondent to the County Planning Commission herein was a "taking". The facts in *Peek* and *Jones* are much the more conclusive and drastic upon the land and its owners than the facts which Appellants bring to this appeal. If the Road Commission in January of 1961, had filed its complaint in condemnation and served process, that act would have produced far more serious consequences than the request actually made. Yet, under the authorities cited, a "taking" actual or constructive, would not have transpired. Unless this Court is willing to overturn the precedent of *Peek* and *Jones*, those decisions are dispositive of Appellants' appeal.

We would add that there are varied instances when a public agency would be deemed to have "taken" private property even though there be no intentional or conscious occupation. The constant flooding of private land, the depositing of materials and the severing of water supply, are examplars of activity which might qualify as a constructive "taking", even though proceedings in Eminent Domain are not pending or contemplated. But there must be some ouster of physical possession in addition to impairment in the use and enjoyment of the land in order that a "taking" exist. Nichols, in his work on Eminent Domain, Volume 2, Page 372, Sec. 6.1(1) inventories the conditions which are necessary to a constructive "taking":

> "* * * Each case must be decided on its own merits until, by the gradual process of judicial exclusion and inclusion, it is possible to say on

> which side of the line any given injury to private property rights may be said to fall. In a general way, however, it may be said that when an interference with the use and enjoyment of land that would be actionable at common law is effected under legal authority and as an incident of the construction of a public improvement, and consists of actual entry upon land and its devotion to public use for more than a momentary period, or of an injury of such a character as substantially to oust the owner from the possession of the land and to deprive him of all beneficial use thereof, there is a taking of property in the constitutional sense, whether there has been any formal condemnation or not."

Those conditions are not here present.

(b) *Authorities cited by Appellants are not relevant.*

A preponderance of the cases which Appellants urge as supportive of their cause involve interruption and ouster of physical possession of the land. Thus, a flooding of the owners fruit grove (*L. L. Richards* v. *United States*, 282 F. 2d 901 (Ct. of Cl. 1960)) and the firing of cannon over private property (*Portsmouth Harbor Land and Hotel Company* v. *United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922)) fit within the inventory of conditions as prescribed by Nichols, supra. They are not applicable to this case.

Several decisions which Appellants cite concern the constitutionality of statutes where it was found that the intent of the legislation was to permanently freeze all de-

velopment of property. Each of those suits deal with a direct attack upon the statute or ordinance. There are at least three reasons why those decisions are not germane. First, Appellants have never attacked the validity of the County Ordinance, 9-7-3, other than collaterally in this suit. Secondly, each of the cases entailed a permanent dedication of land. Thirdly, it was determined in several cases (Apps.' Brief 24-25) that the zoning agencies had not acted in good faith. The good faith of the Respondent in this suit, is not only undenied, but admitted by all.

The rule to which Appellants fasten their hope is set out on page 19 of their Brief. Therein it is said, "Any limitation on the free use and enjoyment of property constitutes a taking of property." Of course, under that framework, zoning regulations, better yet, all police power activity would be tabbed as a constructive "taking". Fortunately, the law does not foresee such a result.

(c) *Appellants' contention is a non-sequitur.*

But there are even larger reasons why Appellants' appeal is to fail. They urge that a "taking" transpired in January of 1961. A "taking" of what? Not of the 12 acres ultimately condemned in July, 1963. If a taking occurred at all in 1961, it was of the entire 35 acres, for Appellants' claim is that the development of the entire property was frustrated and delayed. By claiming a "taking" of the entire ground on the one hand, and the right to compensation only as to a part thereof on the other, a paradox is created.

If as contended, the request made by the Respondent of the Planning Commission in 1961 constituted a "taking", then Appellants are entitled to the market value of the property at that time. But Appellants confirm the trial Court in determining that market value is to be adjudged as of July, 1963, two and one-half years subsequent to the time in which they claim their land was "taken." It is fair to say that the 1963 date reflects higher and appreciated land values. The argument is a non-sequitur.

POINT III.

ANSWERING APPELLANTS' POINT II, LANDOWNERS HAVE ALREADY RECOVERED THE FULL MEASURE OF COMPENSATION UNDER THE LAW.

Appellants, while confessing the weakness of Point I of their Brief, allege under Point II special damages beyond that awarded in the main eminent domain trial. Encompassed within this claim are the loss of investment and interest money ($29,312.95), real taxes assessed for the years 1961 through 1964 ($1,189.20), salaries, insurance premiums, water service, and other costs. Only gasoline and travel expenses to and from the property appear to be eliminated.

Compensation to which Appellants are due is governed by the eminent domain Statute, 78-34-10 U. C. A., 1953. That law is implementive of the Constitutional mandate, Article 1, Section 22, requiring the payment of just compensation for the taking of private property. ***Logan City***

Board of Education v. *Croft*, 13 U. 2d 310, 373 P. 2d 697 (1962); *Sidney Stevens Implement Co.* v. *Ogden City*, 83 Utah 578, 33 P. 2d 181 (1934). It obligates the trial court to find:

> The fair market value of the land and improvements taken (Section (1));
>
> Damages to remaining property caused by the *severance* of the portion acquired and the construction of the public improvement (Section (2));
>
> Damage to land, no part of which is taken, *consequentially* caused by the taking of other property (Section (3)).

At the trial in this matter, the jury and Court found the facts to be:

1)	Market value of total tract (35 acres) before taking	$274,645.00
2)	Market value of remaining tract (23 acres) after taking	144,645.00
	Total Award (Just Compensation)	$130,000.00

The special verdict and judgment were considerate of Section (1) and Section (2) damage under 78-34-10. Section (3) consequential damage, as defined by this Court, was not raised by the evidence of Appellants or embodied within the judgment. *Logan City Board of Education* v. *Croft*, 13 U. 2d 310, 373 P. 2d 697 (1962); *Southern Pacific*

Co. v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960). Thus, the Appellants purchased the 35 acres in 1959 for $170,000.00. The judgment in condemnation was entered in the sum of $130,000.00 for the acquisition of 12 of those acres by Respondent in 1963.

The damages to which Appellants lay claim have no relation to the land value under investigation, either before or after the control date. They have their clearest form in contemplated loss of contract bargain, loss of profits, frustration of future plans and damage *in personam* to the Appellants, all of which this Court has once pronounced to be non-compensable as a matter of law. *State Road Commission* v. *Hansen, et ux.,* 14 U. 2d 305, 383 P. 2d 917 (1963); *State of Utah* v. *Bird & Evans, Inc., and Tedesco,* 4 U. 2d 31, 286 P. 2d 785 (1955); *State of Utah* v. *Tedesco,* 4 U. 2d 248, 291 P. 2d 1028 (1956). See also *Nichols on Eminent Domain,* Vol. 2, p. 185, Sec. 5.76(2), and *West Virginia Pulp & Paper Co.* v. *United States,* 200 F. 2d 100 (4 C. A. 1952). Those damages which inure to and partake of the property itself, were fully adjudicated at the main trial by jury. To recognize Appellants' claims as valid would be to recognize double recovery.

(a) *Appellants' claims constitute separate causes of action against the sovereign, and, in all events, may not be recovered in this proceeding.*

Appellants assume for this Point that the request of Respondent to the Planning Commission in 1961 was not a "taking" of their property. That being the case, their

claim for resulting injury must qualify within one of the conventional forms of action, *ex delicto* or *ex contractu*. Do the claims sound in tort, negligence or intentional, or contract, express or implied? One is hard pressed in responding that the action is in contract, for the rudiments of an agreement, express or implied, are quite absent. A closer course is to hold that the claims are *ex delicto*, either negligent or intentional. In either event, they have their genesis not in or as a result of the condemnation suit initiated in 1963, but in the prior and unrelated acts of the Respondent in 1961. In that capacity, the claims are against the sovereign and are independent of this proceeding. The law is too well settled in this jurisdiction for more than academic debate that the sovereign is immune from suit at law for tortious damage. *Fairclough, et al.* v. *State Road Commission, et al.*, 10 U. 2d 417, 354 P. 2d 105 (1960); *Springville Banking Co.* v. *C. Taylor Burton and State Road Commission*, 10 U. 2d 100, 349 P. 2d 157 (1960); *State of Utah* v. *Bird & Evans, Inc., and Tedesco*, 4 U. 2d 31, 286 P. 2d 785 (1955); *Campbell Bldg. Co.* v. *State Road Commission*, 95 Utah 242, 70 P. 2d 857 (1927). We are quick to add that sovereign immunity is neither waived by the action in condemnation which Respondent filed in 1963, *State Road Commission* v. *Parker*, 13 U. 2d 65, 368 P. 2d 585 (1962); *Commissioner* v. *Berke County*, 364 Pa. 447, 72 A. 2d 129; *Moore on Federal Practice*, Vol. 3, page 43, Section 13.15 (2), nor is the State of Utah, by such filing, thereby subjected to all grievances which the landowners may harbor. *School District No. 2* v. *United States*, 229 F. 2d 681 (6 C. A. 1956). In *State Road Com-*

mission v. *Parker*, supra, it was held that a counter-claim in tort stands on no better footing against the State than an original complaint at law. In both instances, the remedy, if any, was said to rest with the State Board of Examiners. The trial Court, in the suit at bar, viewed the claims of Appellant in a parallel light. (Conclusions of Law No. 3, 4 and 5, R. 74A, 75).

POINT IV.

ANSWERING APPELLANTS' POINT III, ENGINEERING AND PLANNING COSTS FOR A PROPOSED SUBDIVISION ARE NOT RECOVERABLE IN EMINENT DOMAIN.

(a) *Such costs do not constitute an improvement to the realty under* 78-34-10 (1), *U. C. A.*, 1953.

Point III of Appellants' Brief is unimpressive. It is therein said that expenses incurred in devising plans for the proposed subdivision of the condemned acreage are recoverable as an "improvement appertaining to the realty" under Section (1) of 78-23-10. There is no precedent in the law for such a statement.

The Statute is plain in its meaning that an "improvement" requires that some physical and permanent change be evidenced. To classify as an improvement, the asset must be so attached to the realty that, under Property Law, it would pass to a grantee as an appurtenance. Such is

implied from the phrase in the statute "and all improvements *thereon* appertaining to the realty."

Subdivision plans and schemes for property development are not admissible, much less comparable in eminent domain. In *Redondo Beach School District of Los Angeles County* v. *Flodine*, 314 P. 2d 581 (Cal. 1957), the rule was said to be:

> "Coming to appellant's last contention, apparently appellant attempted to subdivide the property in some way or other and ultimately to subdivide all of it, but the usual rule in eminent domain proceedings is that a proposed plan for the development of the property proposed to be taken is not material on the issue of market value."

Nichols on Eminent Domain, Vol. 4, p. 152, Sec. 12.314 is of the same opinion:

> "Evidence may be adduced showing only the naturally adapted uses of the property in its present condition. The owner's actual plans or hopes for the future are completely irrelevant. Such matters are regarded as too remote and speculative to merit consideration."

The contention of Appellants should be rejected.

CONCLUSION

The claim for relief of Appellants is not borne out by the facts. The acts of Respondent in December of 1960 did not produce a "taking" of Appellants' property. The demands for special damages are not well taken, the damage

being non-compensable. Accordingly, the Order of Involuntary Dismissal entered by the lower court should be, by this Court, affirmed.

Respectfully submitted,

PHIL L. HANSEN,
Attorney General,

RONALD N. BOYCE,
Chief Assistant
Attorney General,

ROBERT S. CAMPBELL, JR.,
Special Assistant
Attorney General,

Attorneys for Respondent.